



Comptroller General  
of the United States

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Washington, D.C. 20548

## Decision

**Matter of:** Rust International Corporation; ABB Susa,  
Inc./Brown & Root, a Joint Venture

**File:** B-256886.2; B-256886.3; B-256886.4

**Date:** August 30, 1994

John J. Park, Jr., Esq., A.H. Gaede, Jr., Esq., and Douglas E. Eckert, Esq., Bradley, Arant, Rose & White, and John F. Wall, III, Esq., for Rust International Corporation; and Laurence Schor, Esq., Smith, Somerville & Case, and Richard C. Delin, Jr., Esq., for ABB Susa, Inc./Brown & Root, a Joint Venture, the protesters. Jerome A. Patterson, Esq., Agency for International Development, for the agency. Christine F. Davis, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

The procuring agency improperly rejected the protester's bid for a 2-year, fixed-price construction contract in the Philippines as grossly front-loaded with respect to its mobilization line item price, where the protester's mobilization price was not grossly front-loaded so as to be tantamount to allowing an advance payment; moreover, there is no reasonable doubt that award to the protester will result in the lowest overall cost to the government.

### DECISION

Rust International Corporation and ABB Susa, Inc./Brown & Root, a Joint Venture, protest the proposed award of a contract to Dillingham Construction International, Inc., issued by the Agency for International Development (AID) under invitation for bids (IFB) No. 492-94-001 for construction services related to the Makar Port Improvements project on Mindanao Island in the Philippines. AID rejected both Rust's apparent low bid and ABB Susa's next low bid as unbalanced. Both protesters dispute AID's determination as to their respective bids, and ABB Susa protests any award to Rust.

We sustain Rust's protest and dismiss ABB Susa's protests.

The IFB requested bids for the construction of improvements to an airport facility in General Santos City and a port

facility on Mindanao Island in the Philippines, and provided for a single or split award, on a firm, fixed-price basis, depending upon which bid or combination of bids resulted in the lowest total cost to the government for the combined requirement. Rust's and ABB Susa's protests concern the rejection of their bids with respect to the port project.<sup>1</sup>

The IFB included 18 separate contract line items (CLIN) of work representing the entire construction effort for the port project. CLIN 0001 requested a lump-sum price for mobilization and described the requested work as:

"(m)obilization of all plant, labor, equipment, appliances, materials, and temporary facilities such as Contractor's lay down area(s), Engineer's field office, etc. and permanent works not included in the items given elsewhere in this Tender Schedule that are necessary for the adequate completion of the works within the terms and condition of the Contract."<sup>2</sup>

The IFB provided that all of the contractor's equipment and material for the project, when brought to the site, would be "deemed to be the property of the [government]" and could not be removed without the government's consent. Bidders were informed that this equipment and material would not revert in the contractor until the completion of the contract. The IFB also provided that, should the contractor seek to import the equipment and material from outside the Philippines, the government would assist the contractor in obtaining the necessary clearances and consents to allow importation or exportation.

CLIN 0018 requested a lump-sum price for demobilization and cleanup of the site. The other line items were for specific construction tasks, including a variety of equipment installation services, construction and structural repair

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<sup>1</sup>Dillingham received the award of the airport project on April 18, 1994.

<sup>2</sup>In regard to the airport project, the IFB expressly allowed bidders to include in the mobilization line item the "expenses associated with the cost and transportation of the Contractor's construction equipment." This additional clause defined mobilization as consisting of "preparatory work and operations, including, but not limited to, those necessary for the movement of personnel, equipment, supplies, and incidentals to the project site necessary to accomplish the work of Schedules A, B, C, and D, and for all other work and operations which must be performed, or costs incurred, prior to beginning work on the various items."

services, and utilities installation and repair services. The IFB required the contractor to commence work within 30 days of a notice to proceed and to conclude all work within 2 years, but did not otherwise designate a construction schedule prescribing when a given line item of work must be started or completed. Progress payments were authorized, based upon the bid prices for each CLIN.

The agency received seven bids for the port project by the March 1, 1994, bid opening; the apparent low bid was rejected as nonresponsive. Rust submitted the next apparent low bid of \$16,239,441, followed by ABB Susa's bid of \$16,898,566, and Dillingham's bid of \$17,120,747. The government's estimate for the contract work was \$21,259,443.

#### THE REJECTION OF RUST'S BID

On April 20, the contracting officer rejected Rust's bid as mathematically and materially unbalanced pursuant to Federal Acquisition Regulation (FAR) § 14.404-2(g).<sup>3</sup> The contracting officer explained that:

"[t]he unbalancing is reflected particularly in the exceptionally high mobilization costs comprising 24.77% of your total bid . . . with inordinate concomitant lower prices for other major items. The 'front loading' of the mobilization costs would result in an excessive advance of funds to your firm; would leave unrealistically low amounts remaining for certain work items occurring during later stages of contract performance; and decrease our flexibility in administering the contract."

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<sup>3</sup>In its comments to the agency report, ABB Susa observed that the IFB did not include the standard award clause set forth at FAR § 52.214-10, notifying bidders that their bids could be rejected as unbalanced. ABB Susa argued that this omission deprived the agency of the ability to reject any bid as unbalanced and requires the cancellation of the IFB. ABB Susa did not timely protest this issue within 10 days of learning that its bid had been rejected as unbalanced, see 4 C.F.R. § 21.2(a)(2) (1994); indeed, ABB Susa protested that Rust's bid should have been rejected as unbalanced. In any event, the absence of the FAR § 52.214-10 clause in the IFB does not deprive the agency of the authority to reject a bid as unbalanced. FAR §§ 14.404-2(g) and 15.814, which are applicable to this procurement, provide for the rejection of materially unbalanced bids, including those that are grossly front-loaded.

The agency's conclusion was premised upon a comparison of Rust's individual line item prices against the other prices received and the government's estimate. Specifically, Rust's mobilization price of \$4,026,110 exceeded the other bidders' mobilization prices, which ranged from \$3,387,990 to \$492,210,<sup>1</sup> and the government's estimates for the mobilization CLIN. AID prepared two estimates for the mobilization CLIN: (1) \$645,187, based upon the assumption that the contractor would choose to lease most of the required equipment in the Philippines, and (2) \$2,497,568, based upon the assumption that the contractor would lease and import the equipment from the United States. Neither estimate presumed that the contractor would purchase equipment to perform the contract. The IFB did not specify or prohibit any particular method of performing the mobilization CLIN.

AID did not compare Rust's bid price for the mobilization CLIN to the government's estimate for imported equipment, but relied upon the much lower estimate for local equipment. AID presumed that Rust would be leasing local equipment to perform the contract, based upon an analysis of Rust's price for demobilization. Specifically, AID estimated that demobilization of imported leased equipment would cost \$1,955,660, as compared to \$352,548 for demobilization of local leased equipment. Because Rust's demobilization price was \$20,000, AID believed that Rust was not importing its equipment. AID thus concluded that Rust's bid, based upon a comparison with the government's estimate for local equipment, was "grossly unbalanced with regard to the mobilization and demobilization pay items alone."<sup>2</sup> AID did

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<sup>1</sup>AID also determined that ABB Susa's mobilization price of \$3,387,990 was grossly front-loaded; this is the subject of ABB Susa's protest.

<sup>2</sup>A construction engineer who reviewed this analysis for the agency cautioned, however, that:

"[i]t is impossible to assess the details of the contractors' bids related to mobilization costs, since [we] do not know their bid breakdowns. Any attempt on our part to arbitrarily extract a detailed analysis from the lump sums quoted would be mere speculation. I would urge that we avoid putting ourselves in this untenable position.

"We must emphasize that the . . . estimate is based upon all equipment being available and obtained in-country (probably by lease/rental). The Contractors may not have used this approach,  
(continued...)

not request Rust to explain its price breakdown prior to rejecting its bid.

#### THE RUST PROTEST

Rust protests that its bid is neither mathematically nor materially unbalanced. First, Rust argues that AID improperly determined that its mobilization costs were "exceptionally high," based upon the agency's application of the wrong government estimate. In this regard, Rust states that "[it] intended to purchase all of the necessary equipment specifically for this project and . . . to ship equipment to the site from the [United States]," and that its mobilization price included the costs of purchasing and importing the equipment. Rust asserts that this is an acceptable approach under the IFB, which specifically requested that bidders separately price their start-up and mobilization costs.<sup>6</sup> To demonstrate the cost elements of its mobilization price, the protester furnished an equipment list and affidavit showing the items to be purchased at their expected capital cost, which was in excess of \$2 million, and ascribed the balance of its mobilization line item price to the costs of shipping the equipment; transporting personnel to the site; establishing an office and other facilities; acquiring the necessary bonds and insurance; plus a reasonable mark up.<sup>7</sup>

Rust also challenges the agency's assumptions concerning its price for demobilization. The protester argues that AID's analysis, which simply assumed that all contractors would lease the required equipment, overlooks the possibility that a contractor might choose to purchase the equipment for contract performance. Rust states that its demobilization price was low because it intended, after completion of the contract, to sell the equipment and to use the proceeds to pay for demobilization. Rust acknowledges that, if it

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<sup>5</sup>(...continued)

perhaps basing their bids on importing certain equipment items."

<sup>6</sup>In this regard, Rust refers to the additional clause in the airport project portion of the solicitation that allowed contractors to put the entire cost of acquiring and transporting equipment in the contractor's mobilization CLIN for that project.

<sup>7</sup>AID and ABB Susa attack the credibility of Rust's stated intention to purchase and import equipment for performance of the contract. Rust, however, identified in its protest letter its intention to use imported equipment even before it learned that the agency had presumed otherwise.

failed to do so, it would be responsible for the cost of exportation under the terms of this fixed-price contract.

An examination of bid unbalancing has two aspects. First, the bid must be evaluated mathematically to determine whether each item carries its share of the cost of the work, plus overhead and profit; if the bid is based on nominal prices for some work and inflated prices for other work, it is mathematically unbalanced. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is reasonable doubt that award to the bidder submitting the mathematically unbalanced bid will result in the lowest ultimate cost to the government or where it is so grossly front-loaded that its acceptance would be tantamount to allowing an advance payment. FAR SS 14.402-2(g), 15.814; Jasper Painting Serv., Inc., B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204; ACC Constr. Co., Inc., B-250688, Feb. 16, 1993, 93-1 CPD ¶ 142; F&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573.

First, Rust's bid cannot be considered so grossly front-loaded as to be tantamount to allowing an advance payment. In this regard, we have only found bid prices to be grossly front-loaded in limited situations where the front-loaded prices were many multiples higher than the value of the work to be performed or the remaining contract prices. See e.g., ACC Constr. Co., Inc., *supra* (line item bid price of \$4.7 million compared to government estimate of \$1.8 million); F&E Erection Co., *supra* (line item bid price of \$75,000 compared to government estimate of \$13,741); Islip Transformer & Metal Co., Inc., B-225257, Mar. 23, 1987, 87-1 CPD ¶ 327 (first article prices were \$15,000 and the production unit prices were \$408.90); Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, *aff'd*, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, *reaff'd*, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515 (first article prices were \$22,510 and the production unit prices were \$19.17); Edgewater Mach. & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630 (first article prices were \$125,000 and the production unit prices were \$301); Riverport Indus., Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, *aff'd*, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108 (first article prices were \$185,000 and the production unit prices were \$250). On the other hand, front-loaded bids which are not grossly front-loaded may be accepted. See Integrated Protection Sys., Inc., B-254457.2; B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24 (installation price less than three times the government estimate and not even two times greater than the next low bidder's price); Dodge Romig Tex Corp., B-241810, Mar. 5, 1991, 91-1 CPD ¶ 246 (first article prices approximately three times the production unit price).

Here, the agency unreasonably concluded that Rust's bid was grossly front-loaded. As noted above, the agency arrived at its determination by comparing Rust's mobilization price against a government estimate that incorrectly presumed that Rust would lease its equipment locally. This invalid comparison--which elevated Rust's mobilization price more than six times above the government's estimate--drove the agency's determination that the bid was grossly front-loaded. If the agency had compared Rust's mobilization price with the government's estimate for imported leased equipment, Rust's mobilization price of approximately \$4 million is only 1.6 times greater than the government's estimate of approximately \$2.5 million. Furthermore, it seems apparent that Rust's mobilization price would have been found to be much less than 1.6 times a government estimate based upon Rust's approach of purchasing and importing the required equipment--an approach clearly contemplated by the IFB, given the specific IFB provisions governing the vesting of contractor equipment and the importation of such equipment to the work site.<sup>4</sup>

AID has made no effort, upon learning of its erroneous assumption and its use of an incorrect estimate, to explain why Rust's mobilization price is grossly front-loaded, despite being given an opportunity to do so. While AID and ABB Susa assert that Rust's mobilization price represents an enhanced share of the contract costs and argue that Rust should have amortized its capital equipment costs, insurance costs, and bond costs over each line item of work, rather than lumping these costs into its mobilization price, these arguments do not demonstrate that Rust's allegedly inflated mobilization price so exceeds the value of the work to be performed, estimated by the government at \$2.5 million, as to amount to gross front-loading. In this regard, we note that the IFB mobilization description does not appear to require bidders to amortize their start-up costs and could be construed as authorizing Rust's pricing of its

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<sup>4</sup>Rust has also argued, without rebuttal, that the government's estimate is understated because it excludes the costs of mobilizing expatriate personnel and the costs of several equipment items, which together amount to approximately \$360,000 of Rust's mobilization price.

mobilization line item.<sup>9</sup> See Cottrell Eng'g Corp., B-252891; B-252891.2, Aug. 2, 1993, 93-2 CPD ¶ 66; Jasper Painting Serv., Inc., *supra*; Glen Indus. Communications, Inc., B-248223, May 19, 1992, 92-1 CPD ¶ 453. In any case, even if Rust's price includes certain expenses not properly charged to the mobilization line item, we do not think that the alleged enhancement of its price was so severe as to establish gross front-loading of its bid. As previously stated, Rust's mobilization price is only 1.6 times the government's estimate for importing leased equipment and probably much less than that if compared to an estimate for importing purchased equipment.<sup>10</sup>

The agency argues that Rust's bid may not result in the lowest overall cost to the government as too much risk inheres in Rust's mobilization approach to permit the acceptance of its bid. For example, the agency contends that Rust cannot mobilize and commence construction within 30 days of the notice to proceed using imported equipment, or will realize such a large progress payment for doing so that it will lack sufficient funds to complete the remaining contract work. In addition, the agency argues that Rust's proposed purchase of the contract equipment (even though permitted by the IFB) involves greater risk to the government during contract administration than an approach based on leasing the equipment.

There is no reasonable doubt that award to Rust will result in the lowest ultimate cost to the government. A single award is being made for all line items on this non-divisible construction project, and Rust will ultimately be paid on the basis of its overall low, fixed price. There is no suggestion that the agency does not intend to require the completion of all contract work or that it even contemplates the possibility of an early contract termination. See F&E Erection Co., *supra*; IMPESA Int'l, Inc., B-221903, June 2, 1986, 86-1 CPD ¶ 506; Dement Constr. Co.; Universal Constr. Co., B-192794, Dec. 8, 1978, 78-2 CPD ¶ 399.

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<sup>9</sup>While the mobilization definition given in the port project portion of the IFB encompasses the expenses associated with the "[m]obilization of all . . . equipment," the airport project portion of the IFB more explicitly authorizes bidders to include in the mobilization line item the "expenses associated with the cost and transportation of the Contractor's construction equipment."

<sup>10</sup>As indicated above, the government's estimate also appears otherwise understated. See footnote 8, *infra*.



In any case, we think the agency's risk arguments are misplaced. For example, the IFB does not require the contractor to mobilize, but to "commence work," within 30 days of the agency's notice to proceed, which Rust states it can do. Rust also states that its mobilization efforts will extend over a 6-month period and will allow for more gradual progress payments than the agency contends; that is, progress payments based upon Rust's mobilization CLIN, which amount to 25 percent of Rust's total contract price, will occur over 25 percent of the total performance period. In addition, we note that the IFB provides that any equipment purchased for the contract, once brought to the site, would be deemed government property and would not revert in the contractor until completion of the contract; should AID terminate the contract, the government could seek the equipment as termination inventory under the standard termination clauses in the IFB. See Farrell Constr. Co., B-191786, July 18, 1978, 78-2 CPD ¶ 45, aff'd, B-191786, Sept. 8, 1978, 78-2 CPD ¶ 179.

In sum, we find no basis in this record to conclude that Rust's bid will not reasonably result in the lowest ultimate cost to the government or that Rust's bid is so grossly front-loaded as to be tantamount to allowing an advance payment. Accordingly, we find that AID improperly rejected Rust's bid and sustain Rust's protest on that basis.

#### ABB SUSA'S PROTESTS

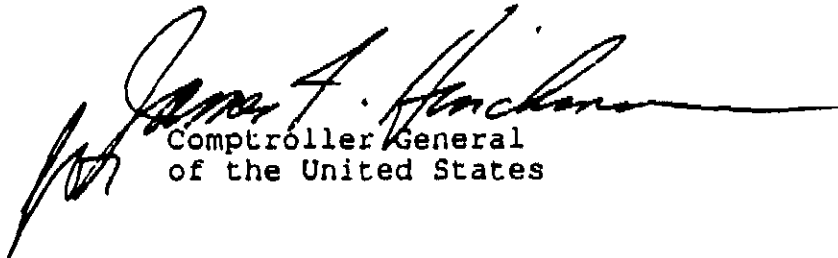
Besides protesting that Rust's bid should have been rejected as unbalanced (which, as discussed above, is not the case), ABB Susa protests the award to Rust on grounds that the IFB contains definitive responsibility criteria which Rust does not satisfy. A definitive responsibility criterion is defined as a specific objective standard, i.e., qualitative and quantitative, that is established by a procuring agency in a solicitation to measure a bidder's ability to perform a contract. Teltara, Inc., B-245806.2, Apr. 14, 1992, 92-1 CPD ¶ 363. Here, the IFB seeks information generally relating to a bidder's responsibility, such as prior contract information and references, current financial statements, and key personnel resumes, but does not establish any definitive standard that bidders were required to meet in order to be considered responsible. See id.; CVD Equip. Corp., B-237637, Mar. 8, 1990, 90-1 CPD ¶ 259; The Forestry Ass'n., Inc., B-237225.2, Nov. 17, 1989, 89-2 CPD ¶ 476. Our Office will not review an agency's affirmative determination of a contractor's responsibility, absent a showing of possible fraud or bad faith on the part of agency officials, or a showing that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5). Since there are no definitive responsibility

criteria in the IFB, we dismiss ABB Susa's protest that Rust should be deemed nonresponsive on this basis.

Furthermore, because we sustain Rust's protest and we dismiss ABB Susa's protest of an award to Rust, ABB Susa is not an interested party to protest the rejection of its next low bid as unbalanced. A protester is not an interested party under our Bid Protest Regulations where it would not be in line for award were its protest to be sustained. See 4 C.F.R. §§ 21.0(a), 21.1(a); Koehring Cranes & Excavators; Komatsu Dresser Co., B-245731.2; B-245731.3, Nov. 23, 1992, 92-2 CPD ¶ 362. Even if ABB Susa is correct that its bid was improperly rejected, the firm would not be in line for award and therefore ABB Susa lacks the direct economic interest required to maintain a protest. Id.

Accordingly, Rust's protest is sustained and ABB Susa's protests are dismissed.

We recommend that AID make award to Rust as the low bidder, if otherwise responsible. Under the circumstances, Rust is entitled to recover its costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Rust should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to AID within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

  
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